Office-Supreme Court, U.S.
FILED
SEP 20 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 593

KOEHRING COMPANY, PETITIONER

v.

HYDE CONSTRUCTION COMPANY, INC., RESPONDENT

and

KOEHRING COMPANY, PETITIONER

v.

VARDAMAN S. DUNN, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner, Koehring Company (hereinafter "Koehring"), prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit in the above entitled case entered on July 21, 1965. A petition for rehearing was denied on August 17, 1965.

OPINIONS BELOW

The opinions and orders below are as follows: the order and attached memorandum of the Northern District of Oklahoma, filed September 1, 1964 (R. 82-87)* (Appendix A, infra, page 11); the opinion and Judgment of the Court of Appeals on review of the Northern District of Oklahoma's order, filed July 21, 1965 (Appendicies B and C, infra, page 17); the order of the Court of Appeals denying petition for rehearing, filed August 17, 1965 (Appendix E, infra, page 42). Koehring's petition for rehearing is printed in Appendix D, infra, page 29); and the order of the Court of Appeals staying its mandate (Appendix F, infra, page 42).

Because the specific issues involved here were also ruled on in the same case by the Court of Appeals for the Fifth Circuit, its opinions and orders are also pertinent here. They are: The order of the Court of Appeals for the Fifth Circuit dated September 19, 1963 (R. 136ss-137ss) (Appendix G, infra, page 43, and reported at 324 F.2d 295); the order of the Court of Appeals for the Fifth Circuit dated March 6, 1964, (R. 137ss-138ss) (Appendix H, infra, page 49); and the order of the Court of Appeals for the Fifth Circuit dated March 10, 1964 (R. 23-25) (Appendix I, infra, page 51).

Except as noted the above opinions and orders are not yet officially reported.

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*All references to the printed record are designated "R". Page numbers without suffix are in the initial volume bound by the lower court Clerk; those with the "s" suffix appear in the supplemental record volume prepared by appellants; and the ones having "ss" as a suffix are in the second supplemental record volume submitted by appellee.

JURISDICTION

The order of the Court of Appeals was entered on July 21, 1965 and a petition for rehearing was denied on August 17, 1965. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1) (1958).

QUESTIONS PRESENTED

I. Does a Court of Appeals have the power to order the *instanter* transfer of a cause of action when it determines justice demands such a transfer?

II. Absent extraordinary circumstances, may a Court of Appeals reverse the prior decision of another Court of Appeals in the same case on the identical issue and facts?

STATUTES INVOLVED

28 U.S.C. §§1404 and 1406 provide as follows:

> §1404(a) "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."
>
> §1406(a) "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

28 U.S.C. §1651 provides as follows:

> §1651(a) "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

I. Basic Facts

This controversy involves two identical lawsuits relating to the performance of construction equipment at a U. S. Army Corps of Engineers project near Tulsa, Oklahoma. The first suit was brought by Hyde Construction Company, Inc. (hereinafter "Hyde") on August 30, 1961, against Koehring in the Federal District Court for the Southern District of Mississippi (hereinafter "Mississippi Federal Court"). It prayed for writs of chancery attachment, injunctive relief, a declaratory judgment and a money judgment. (R. 5-11). Approximately a month later Hyde filed an identical complaint against Koehring in the Chancery Court of the First Judicial District of Hinds County, Mississippi (hereinafter "Mississippi State Court").

Various proceedings took place in the Mississippi Federal Court case and on September 19, 1963, the Court of Appeals for the Fifth Circuit, reversing the Mississippi Federal Court, ordered that the case be transferred to the Federal District Court for the Northern District of Oklahoma (hereinafter "Oklahoma Federal Court") for the convenience of the parties and witnesses and in the interests of justice. (R. 136ss-137ss) (Appendix G, infra, page 43). The Mississippi Federal District Judge did not transfer the case as ordered, but on February 24, 1964 entered an order of dismissal upon motion by Hyde (R. 22).

On March 6, 1964, the Court of Appeals for the Fifth Circuit issued an ex parte temporary restraining order prohibiting further proceedings in the Mississippi State Court case which had been scheduled for imminent trial, (R. 137ss-138ss) (Appendix H, infra, page 49), and which involved issues identical to those in the federal ac-

tion that the Fifth Circuit had determined should be tried in Oklahoma.

On March 10, 1964, the Court of Appeals for the Fifth Circuit vacated the Mississippi Federal Court's dismissal of the action and granted a writ of mandamus ordering the Mississippi Federal Judge to transfer the case to the Oklahoma Federal Court. In addition, the Court of Appeals for the Fifth Circuit said:

> "[S]ince phases of the case are pending for imminent trial in the State Courts of Mississippi, and Koehring is of the view that it has a substantial basis for obtaining injunctive relief from the United States District Court for the Northern District of Oklahoma, we think that for the protection of the rights of all concerned, this order should, and hereby does, constitute the writ of mandamus . . . . . The Clerk of the District Court shall physically transfer the papers without delay and pending the entry of the order of transfer by the District Judge and the physical filing of the record in Oklahoma, this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma." (R. 23-25) (Appendix I, infra, pages 52-53).

The Court of Appeals for the Fifth Circuit, having transferred jurisdiction to the Oklahoma Federal Court, then vacated its March 6th temporary restraining order as being "no longer necessary or appropriate in aid of [the Fifth Circuit's own] jurisdiction" because "the issuance of this writ fully protects and effectuates the orders, judgments, and mandates of this court." (R. 23-25) (Appendix I, infra, page 53).

II. Proceedings Before the Oklahoma Federal Court

On the next day, March 11, 1964, Koehring filed in the Oklahoma Federal Court the order of the Court of Appeals for the Fifth Circuit and a petition for a temporary restraining order and injunction against further Mississippi State Court proceedings so that the issues between the parties could be tried in the previously instituted federal action. (R. 43-46).

Both parties attended a hearing on March 11 before the Oklahoma Federal Judge (R. 142ss-186ss) who then granted a temporary restraining order to maintain existing conditions until he could decide whether the Federal Court's jurisdiction should be protected by an injunction. The order restrained Hyde and its attorneys from proceeding with the Mississippi State Court action and provided for a $10,000 bond to protect Hyde against damages if it were later found to have been wrongfully restrained. (R. 46-47).

Hyde and its attorneys, including Respondent Dunn, refused to obey the order even though the Mississippi State Judge offered to postpone the trial. (R. 60 [finding 20]). The trial then proceeded and Hyde obtained a judgment of $464,450.08 in the Mississippi State Court.

After a hearing on March 14, 1964, the Oklahoma Federal Court entered findings and held Hyde and Dunn in civil contempt. (R. 61 [finding 25]). On September 1, 1964, the Court entered the Judgment and Order attached hereto as Appendix A (R. 82-87). In addition to certain costs, the judgment enjoined Hyde and its attorneys, until further order of the Court, from enforcing or collecting the Mississippi State Court judgment.

III. Review By the Court of Appeals

Upon appeal by Hyde, the Court of Appeals for the Tenth Circuit reversed, ruling that the Oklahoma Federal Court did not have jurisdiction over the subject matter of the lawsuit at the time it issued its restraining order. Contrary to the March 10th order of the Court of Appeals for the Fifth Circuit, it held that the Fifth Circuit did not have the power to constitute one of its orders a transfer under 28 U.S.C. §1651. In addition it held that a court of appeals had no power to transfer under 28 U.S.C. §§1404(a) and 1406(a) because those sections restricted such power to district courts. Finally, the Court of Appeals for the Tenth Circuit held that the case file must be physically received in the transferee court before that court acquires jurisdiction. (Appendix B, infra, page 17).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Prior Decisions of Other Courts of Appeals

The decision of the Court of Appeals for the Tenth Circuit conflicts with prior decisions of other courts of appeals in two ways. First, in this very same case and on the very same fact situation the Court of Appeals for the Fifth Circuit previously determined that it could effect an *instanter* transfer and in fact did order the *instanter* transfer of the action to the Oklahoma Federal Court.

The Court of Appeals for the Fifth Circuit, realizing that there would necessarily be a delay in physically transferring the file from Mississippi to Oklahoma, ordered that, pending the actual physical transfer of the record, its order should itself constitute a transfer on the

basis of which the parties could present the matters in issue to the Oklahoma Federal Court.*

The Court of Appeals for the Tenth Circuit has ruled exactly the opposite, i.e., that courts of appeals do not have such power and that the case file must be physically received before jurisdiction is present in the transferee court.

There is very little prior authority on the subject, yet clearly the Courts of Appeals for the Fifth and Tenth Circuits disagree as to the interpretation of Section 1651.

Second, in reversing the Court of Appeals for the Fifth Circuit's decision, the Court of Appeals for the Tenth Circuit cited no extraordinary circumstances demanding a different result. It is clearly the law in other circuits that, absent such extraordinary circumstances, a court of coordinate jurisdiction should not be reversed in the

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* "But since phases of the case are pending for imminent trial in the State Courts of Mississippi, and Koehring is of the view that it has a substantial basis for obtaining injunctive relief from the United States District Court for the Northern District of Oklahoma, we think that for the protection of the rights of all concerned, this order should, and hereby does, constitute the writ of mandamus. Accordingly, the District Judge is hereby ordered to vacate the order or orders of dismissal heretofore entered on February 24, 1964, and is further ordered to immediately transfer the cause to the District Court for the Northern District of Oklahoma. This Court having the power to construe its own orders and mandates also declares that the order of January 27, 1964, its original mandate and the order of February 5, 1964, denying the petition for rehearing all affirmatively recognize that either one, or both, or all of the parties shall have the right to apply to the District Court for the Northern District of Oklahoma to have the case transferred back to the Southern District of Mississippi because of alleged changed conditions. The Clerk of the District Court shall physically transfer the papers without delay and pending the entry of the order of transfer by the District Judge and the physical filing of the record in Oklahoma, this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma . . . ." March 10, 1964 Order of United States Court of Appeals for the Fifth Circuit attached hereto as Appendix I.

same case. *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 810 (9th Cir., 1963); *Prack v. Weissinger*, 276 F.2d 446, 450 (4th Cir., 1960); *United States v. Wheeler*, 256 F.2d 745 (3rd Cir., 1958). These cases concerned the deference to be given the decision of one district judge by another, but the reasoning is directly applicable to courts of appeals.

II. The Case Presents Important Questions Which Should Be Settled By This Court

This case presents an opportunity for this Court to provide guidelines to the Courts of Appeals as to what powers they have when faced with the unusual case which demands an unusual remedy. If the decision of the Court of Appeals for the Tenth Circuit is sustained it means that the Court of Appeals for the Fifth Circuit was powerless to protect the rights of the parties before it by declaring an *instanter* transfer, even though it clearly felt that the action it took was necessary to protect such rights. This case would not only give an opportunity to set a guideline as to the scope of 28 U.S.C. §1651 but also as to the inherent powers of a court of appeals "to effectuate what seems . . . to be the manifest ends of justice." *United States v. Ritter*, 273 F.2d 30 (10th Cir., 1959). Clearly such guidelines are needed since two courts of appeals have reached exactly opposite decisions on the same facts and issues.

This case also presents an opportunity for this Court to outline the consideration to be given the decision of one Court of Appeals by another in the same case. The law is clear that one district judge should not overrule a prior decision of another district judge in the same case without some very good reason. This case presents

an opportunity for this Court to establish that rule as between courts of appeals.

This case is important to many future litigants, certainly to all litigants who must request some action or relief which has not been granted specifically in the past and which invokes the inherent power of the courts. It is also important to establish the proposition that future litigants, whose rights have been pronounced by one court of appeals, can rely on that ruling without concern that they may later in the same case be left without remedy because of a reversal by another court of appeals.

CONCLUSION

For the foregoing reasons, it is submitted that this petition for certiorari should be granted.

Respectfully submitted,

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Dated September 18, 1965